



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS-2020-0031]

RIN 0750-AK97

Defense Federal Acquisition Regulation Supplement: Prohibition on Contracting with Persons That Have Business Operations with the Maduro Regime (DFARS Case 2020-D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a statute that prohibits DoD from entering into contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 571-372-6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 85 FR 53751 on August 31, 2020, to implement section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 890 prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions. Six respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

To further clarify and to eliminate any ambiguity, the solicitation provision 252.225-7055, Representation Regarding Business Operations with the Maduro Regime, was revised to clarify that "... by submission of its offer, the Offeror represents that the Offeror is a person that— (1) Does not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the U.S. Government; or ...". The contract clause 252.225-7056, Prohibition Regarding Business Operations with the Maduro Regime, applies to the entity that was awarded the contract. Therefore, no change was made to the clause.

Additional revisions were made to the text and clause number designations to accommodate updated numerical designations required in the final rule. In addition, a revision was made to 225.7020-4, Joint Determination, to explicitly state that delegation authority is to remain at the level of Secretary of Defense and Secretary of State without power of redelegation.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents provided overall support of the rule. A respondent expressed support for the rule because it is an effectual way to limit the Maduro regime's access to American made or American preferred military technology. The respondent also expressed support for the exceptions for humanitarian aid. Another respondent supported the rule overall because limiting contracts is a push in opposition of the Maduro regime. A respondent commended the rule and hopes this is not a final step in solving unrest in Venezuela.

Response: DoD acknowledges the respondents' support for the rule.

2. Joint Determination

Comment: A respondent expressed concern that requiring a joint determination of both the Secretary of Defense and the Secretary of State that the restriction does not apply to certain acquisitions may limit the relief that can be provided to the people of Venezuela. Another respondent expressed similar concern with the high level of approval necessary for

the joint determination and also expressed concern with the process for making the joint determination. A respondent included a list of proposed factors to consider in whether to seek a joint determination. A respondent further stated that there were no procedures or guidance on the Government determination process.

Response: The proposed rule implements section 890 of the NDAA for FY 2020. Section 890 prohibits DoD from entering into a contract for the procurement of goods or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government. Section 890 does not apply the prohibition to acquisitions where the Secretary of Defense and Secretary of State have jointly determined that the acquisition is necessary for providing humanitarian assistance, disaster relief, or urgent lifesaving measures to the people of Venezuela; carrying out noncombatant evacuations; or is otherwise vital to U.S. national security interests. The process of the joint determination is in accordance with internal Government operating procedures. The rule's implementation is consistent with the statutory requirements of section 890 and does not allow for further delegation of the authority for the joint determination. Thus, the final rule implements the authority for the joint determination at the level of the Secretary of Defense and Secretary of State.

3. National Security Waiver

Comment: A couple of respondents provided questions relating to the lack of guidelines for securing a national security interest exception in the proposed rule.

Response: The final rule is directly aligned with the statutory language and implements section 890 of the NDAA for FY 2020. The reference to national security interests appears in section 890(b)(1)(A) and was implemented accordingly in DFARS 225.7020-4(a)(2) of the final rule.

4. Definitions

Comment: A respondent stated that the definition of "person" is overly broad and could adversely affect contracts held by businesses that have no operations in, or connections with, Venezuela. Another respondent further stated that in light of the broad definition of "person" and "business operations" in the rule, there is a lack of clarity in the solicitation provision 252.225-7055 as to whether an "offeror" who certifies that it does not have any business operations with an authority of the Maduro regime is submitting such statement on behalf of the offeror with a discrete unique identifier number or Commercial and Government Entity (CAGE) code or as "person" is defined under the proposed rule. The respondent also stated that the clause 252.225-7056 is not clear on whether the clause requires the contractor, specifically the legal entity that was awarded the contract, to refrain from engaging in business with

the Maduro regime or whether the obligation extends to the contractor's ties within the definition of "person".

Response: DoD acknowledges the respondent's comment. The final rule implements and is aligned with the statutory language as provided in section 890 of the NDAA for FY 2020. There is no certification requirement per 41 U.S.C. 1304; rather there is a representation requirement, which is less burdensome than a certification. To further explain and eliminate any ambiguity, the provision at DFARS 252.225-7055 was revised to clarify that "... by submission of its offer, the Offeror represents that the Offeror is a person that— (1) Does not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the U.S. Government; or ...". The clause at DFARS 252.225-7056 applies to the entity that was awarded the contract. Accordingly, no change was made to the clause. In addition, the definitions, defined in the provision in the proposed rule, are listed and a cross-reference added to point to those terms being defined in the clause.

5. Adverse Impacts

Comment: A respondent commented that the proposed rule would have adverse effects on U.S. defense programs, force readiness, the defense industrial base, and American workers. The respondent further requested that DoD conduct a review of the law's impact on the defense industrial base, military readiness, DoD acquisition programs as well as the economy and employment.

Another respondent stated that implementing the rule without clear guidelines would have impacts to defense contractors.

Response: The proposed rule implements section 890 of the NDAA for FY 2020 that prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to the listed exceptions. Section 890 does not require a review of the defense industrial base, military readiness, DoD acquisition programs, the economy, or employment. Consequently, the rule implements the prohibition in accordance with section 890 of the NDAA for FY 2020 and unless certain exceptions apply requires contracting officers to include the provision and the clause in solicitations and contracts, including those for the acquisition of commercial items, and prohibits the award of a contract to a prohibited entity in accordance with the associated policy guidance.

6. Extension Request

Comment: A couple of respondents requested an extension to the comment period for additional time to provide comments.

Response: DoD acknowledges the extension request. The public comment period was not extended.

7. Out of Scope

a. Mitigation Measures

Comment: A respondent stated the proposed rule does not contain any mitigation measures that would enable an American subsidiary that is ultimately foreign-owned to provide goods and

services to DoD irrespective of how tangentially related another entity, that has business operations with the Maduro regime, may be to the U.S. company. The respondent further stated the rule poses a real impediment to the DoD's ability to contract with companies that offer mission-critical, lifesaving products and services to service members.

Response: The comment is outside the scope of the rule. The final rule implements section 890 of the NDAA for FY 2020 and prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to listed statutory exceptions. The statutory prohibition in section 890 does not allow for mitigation measures.

b. Additional Policy

Comment: A respondent recommended the U.S. Government go further than this rule and adopt the recommendations outlined in the Atlantic Council's article titled "The Maduro Regime's Illicit Activities: A Threat to Democracy in Venezuela and Security in Latin America". The article calls for a task force comprised of various U.S. Government agencies that would focus on the alleged criminal enterprises around the Maduro regime.

Response: The comment is outside the scope of the rule. The prohibition in section 890 of the NDAA for FY 2020 does not include requirements for a task force or the recommended additional policy measures. The final rule implements the statutory requirements in section 890, subject to the listed

statutory exceptions and prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela.

C. Other Changes

The following changes have been made throughout the final rule:

- The reference to "section 28 U.S.C. 1603(b)" was changed to "28 U.S.C. 1603(b)" in the definition of "agency or instrumentality of the government of Venezuela."

- "United States Government" was changed to "U.S. Government" to comply with DFARS drafting conventions.

III. Applicability to Contracts at or below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule creates a new provision and a new clause: (1) DFARS 252.225-7055, Representation Regarding Business Operations with the Maduro Regime; and (2) DFARS 252.225-7056, Prohibition Regarding Business Operations with the Maduro Regime. DoD applies the provision and the clause to solicitations, contracts, or subcontracts at or below the simplified acquisition threshold (SAT) and to the acquisition of commercial services and commercial products, including commercially available off-the-shelf (COTS) items, as defined at Federal Acquisition Regulation (FAR) 2.101. This DFARS rule implements section 890 of the NDAA for FY 2020. Section 890 prohibits

contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions.

A. Applicability to Contracts at or below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products, Including COTS Items

10 U.S.C. 2375 exempts contracts and subcontracts for the acquisition of commercial items (including COTS items) from provisions of law enacted after October 13, 1994, that, as determined by the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), set forth policies, procedures, requirements, or restrictions for the acquisition of property or services unless—

The provision of law—

- Provides for criminal or civil penalties;

- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533a or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b; or

- Specifically refers to 10 U.S.C. 2375 and states that it shall apply to contracts and subcontracts for the acquisition of commercial services and commercial products (including COTS items); or USD (A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial products and services from the applicability of the provision.

This authority has been delegated to the Principal Director, Defense Pricing and Contracting.

C. Applicability

Section 890 of the NDAA for FY 2020 is silent on applicability to contracts and subcontracts in amounts no greater than the SAT or for the acquisition of commercial services and commercial products including COTS items. Also, the statute does not provide for civil or criminal penalties. Therefore, it does not apply to contracts or subcontracts in amounts not greater than the SAT or to the acquisition of commercial products and commercial services unless the Principal Director, Defense Pricing and Contracting, makes a written determination as provided in 41 U.S.C. 1905 and 10 U.S.C. 2375.

Not applying this rule to contracts and subcontracts at or below the SAT and for the acquisition of commercial services and commercial products, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule, which is to prohibit contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to the listed exceptions. This is particularly true with regard to the acquisition of fuel and petroleum, procurements which are usually commercial products and commercial services. To not include the acquisition of fuel and petroleum within this prohibition or to not apply the prohibition at or below the SAT will unacceptably diminish the impact of these sanctions on the Maduro regime, the government of Venezuela that is not recognized by the United States Government as the legitimate government of Venezuela. Subsequently, DoD has applied the rule to contracts and subcontracts at or below the SAT and for the acquisition of commercial services and commercial products, including COTS items.

IV. Expected Impact of the Rule

This rule creates new DFARS provision 252.225-7055, Representation Regarding Business Operations with the Maduro Regime, and new clause 252.225-7056, Prohibition Regarding Business Operations with the Maduro Regime. The new provision and clause are prescribed at 225.7020-5(a) and (b). DoD has

applied the requirements of section 890 of the NDAA for FY 2020 to contracts at or below the SAT. Section 890 prohibits DoD from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government subject to the listed exceptions.

The rule does not add any new burden. Contracting officers will include the provision and the clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial services and commercial products including COTS items, unless an exception at 225.7020-3(b) applies or a joint determination has been made in accordance with 225.7020-4.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section

6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The final rule is necessary to revise the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 that prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions for contracts that are—

- Jointly determined by the Secretary of Defense and the Secretary of State to be necessary for certain humanitarian or

disaster relief purposes or vital to the national security interests of the United States;

- Related to the operation and maintenance of the United States Government's consular offices and diplomatic posts in Venezuela; or

- Awarded to a person that has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

The objective of the rule is to implement section 890 of the NDAA for FY 2020.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD reviewed data obtained from the Federal Procurement Data System (FPDS) for FY 2017, FY 2018, and FY 2019 (including contracts that do not exceed the simplified acquisition threshold) to determine the estimated impact of the rule on U.S. small businesses. There were no DoD actions reported to FPDS in FY 2017 through FY 2019 for which the contractor is located in Venezuela or the place of performance is Venezuela.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

DoD has not identified any alternative approaches to the rule that would meet the requirements of the statute.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by adding paragraphs (f) (x) (II) and (JJ) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(x) * * *

(II) Use the provision at 252.225-7055, Representation Regarding Business Operations with the Maduro Regime, as prescribed in 225.7020-5(a), to comply with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

(JJ) Use the clause at 252.225-7056, Prohibition Regarding Business Operations with the Maduro Regime, as

prescribed in 225.7020-5(b), to comply with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

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PART 225—FOREIGN ACQUISITION

3. Add sections 225.7020, 225.7020-1, 225.7020-2, 225.7020-3, 225.7020-4, and 225.7020-5 to subpart 225.70 to read as follows:

* * * * *

Sec.

225.7020 Prohibition on contracting with the Maduro regime.

225.7020-1 Definitions.

225.7020-2 Prohibition.

225.7020-3 Exceptions.

225.7020-4 Joint determination.

225.7020-5 Solicitation provision and contract clause.

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225.7020 Prohibition on contracting with the Maduro regime.

225.7020-1 Definitions.

As used in this section—

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in 28 U.S.C. 1603(b), with each reference in section 1603(b) to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities,

personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3))); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

225.7020-2 Prohibition.

In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the U.S. Government, except as provided in 225.7020-3 or 225.7020-4.

225.7020-3 Exceptions.

The prohibition in 225.7020-2 does not apply if-

(a) The person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury; or

(b) The acquisition is related to the operation and maintenance of the U.S. Government's consular office and diplomatic posts in Venezuela.

225.7020-4 Joint determination.

(a) The prohibition in section 225.7020-2 does not apply to an acquisition jointly determined by the Secretary of Defense and Secretary of State, without power of redelegation, to be-

(1) Necessary for purposes of-

(i) Providing humanitarian assistance to the people of Venezuela;

(ii) Disaster relief and other urgent lifesaving measures; or

(iii) Carrying out noncombatant evacuations; or

(2) Vital to the national security interests of the United States.

(b) Follow the procedures at PGI 225.7020-4(b) when entering into a contract on the basis of a joint determination.

225.7020-5 Solicitation provision and contract clause.

(a) Use the provision at 252.225-7055, Representation Regarding Business Operations with the Maduro Regime, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, that include

the clause at 252.225-7056, Prohibition Regarding Business Operations with the Maduro Regime.

(b) Unless the exception at 225.7020-3(b) applies or a joint determination has been made in accordance with 225.7020-4, use the clause at 252.225-7056, Prohibition Regarding Business Operations with the Maduro Regime, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 252.225-7055 to read as follows:

252.225-7055 Representation Regarding Business Operations with the Maduro Regime.

As prescribed in 225.7020-5(a), use the following provision:

REPRESENTATION REGARDING BUSINESS OPERATIONS WITH THE MADURO REGIME (MAY 2022)

(a) *Definitions.* As used in this provision—
Agency or instrumentality of the government of Venezuela,
business operations, government of Venezuela, and *person* have the meaning given in the clause 252.225-7056, Prohibition Regarding Business Operations with the Maduro Regime, of this solicitation.

(b) *Prohibition.* In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of

Venezuela that is not recognized as the legitimate government of Venezuela by the U.S. Government, unless the person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(c) *Representation.* By submission of its offer, the Offeror represents that the Offeror is a person that—

(1) Does not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the U.S. Government; or

(2) Has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(End of provision)

5. Add section 252.225-7056 to read as follows:

252.225-7056 Prohibition Regarding Business Operations with the Maduro Regime.

As prescribed in 225.7020-5(b), use the following clause:

PROHIBITION REGARDING BUSINESS OPERATIONS WITH THE MADURO REGIME

(MAY 2022)

(a) *Definitions.* As used in this clause—

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in 28 U.S.C. 1603(b), with each reference in section 1603(b) to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3))); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

(b) *Prohibition.* In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the U.S. Government, unless the person has a valid

license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(c) The Contractor shall—

(1) Not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the U.S. Government; or

(2) Have a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(d) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts, including subcontracts for the acquisition of commercial items.

(End of clause)